

**United States Department of Labor
Employees' Compensation Appeals Board**

D.C., Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Phoenix, AZ, Employer**

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**Docket No. 12-154
Issued: February 26, 2013**

Appearances:

John Eiler Goodwin, Esq., for the appellant

No appearance, for the Director

Oral Argument February 5, 2013

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 31, 2011 appellant, through his attorney, filed a timely appeal from a June 21, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a recurrence of total disability on January 8, 2010 causally related to the accepted herniated disc at C5-6.

On appeal, appellant's attorney asserts that appellant sustained a recurrence of disability because there was a change in the nature and extent of his light-duty position.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On February 13, 2002 appellant, then a 50-year-old mail handler, filed an occupational disease claim, alleging that he injured his neck and spine due to his job duties. He last worked in June 2000. Following an initial denial by OWCP on April 30, 2002, in a December 26, 2002 decision, OWCP's hearing representative reversed the denial and returned the case to OWCP for acceptance of a herniated disc at C5-6 and to pay appropriate benefits. The hearing representative remanded the case on the issue of whether the July 2000 surgery should be authorized. On January 14, 2003 OWCP accepted that appellant sustained a herniated disc at C5-6.

On December 11, 2003 appellant returned to a modified mail handler position for four hours a day and began working an eight-hour day on January 8, 2004. The December 11, 2003 position was described as monitoring facility security systems including watching television monitors; opening gates and doors; preparing and dispensing hand-held radios and badges; receiving and making telephone calls; and performing clerical duties including updates of security records and data entry of license plate information. The job was indoors and required no climbing, kneeling, bending or stooping, with intermittent lifting of five pounds. Sitting was described as intermittent to continuous; standing limited to no more than 10 minutes at a time; walking no more than 500 feet at a time; and lifting of up to five pounds intermittently. Appellant could sit and stand at his personal comfort level. Twisting, pulling and pushing were restricted to no more than 10 minutes at a time; grasping was limited to four hours daily with the left hand and fine manipulation to two hours daily with the left hand. Reaching above the shoulder was limited to a half hour daily with the left hand.²

Dr. John C. Porter, Board-certified in physiatrist and pain medicine, provided a duty status report dated August 9, 2007 in which he advised that appellant could sit for seven hours; stand and walk for less than one hour; bend and stoop for two hours; and twist for one to two hours; perform simple grasping and fine manipulation for three to four hours; drive a vehicle for three hours, with a lifting/carrying weight restriction of 5 pounds and a pulling/pushing restriction of 12 pounds. Appellant could work inside at a temperature of 80 degrees. The duty status report indicated that the usual work requirements indicated that lifting was restricted to less than 5 pounds continuously and intermittently for .5 hours daily; sitting 7 hours; standing .5 hours; walking .5 hours; no climbing, kneeling, bending, stooping, twisting, or driving; pulling/pushing of less than 12 pounds .01 hours a day; simple grasping and fine manipulation 4 hours a day; reaching above shoulder seldom continuously, 1 pound intermittently for .01 hours daily; and operating a computer for .02 hours a day.

In an August 29, 2008 report, Dr. Jeffrey D. Steier, an attending Board-certified neurologist, noted appellant's complaint of increased problems with neck and arm pain, especially with right hand fine manipulation and right leg weakness. He provided physical examination findings and diagnosed cervical myelopathy and opined that appellant's surgery had more to do with his complaints, rather than work-related issues. Dr. Steier advised that repetitive

² On December 16, 2005 appellant filed a schedule award claim. The record before the Board does not contain a final schedule award decision.

activity at work should be limited because of fatigue and weakness on the right side. In a June 18, 2009 report, he provided examination findings and diagnosed cervical myelopathy. Dr. Steier advised that appellant was unchanged since last being seen one year previously. An upper extremity somatosensory recording was interpreted by him as normal. A lower extremity study was abnormal, suggesting significant dorsal root entry abnormalities, more prominent on the left.

On December 14, 2009 the employing establishment offered appellant a different modified position as a maintenance support clerk, with an available date of January 1, 2010. The duties of the assignment including quality control and classifying miscellaneous pieces of waste mail with duties including verifying postage and class of mail, entering it into a log, copying pieces and tagging mail hampers when full. Appellant was to scan and write-up certified mail for customers; separate nixie and bulk mail; stamp mail that was nondeliverable; sorting mail into trays based on classifications; separate return-to-sender notifications; riffle and case letters; hand sort mail; remove mail from bins; riffle letters for outbound destination; sign for mail; check for priority, express and certified mail; process and prepare receipts; and track mail on computer by tag number by use of computer, scanners and hand-written forms, including signing receipt of express mail. The physical requirements required no climbing, kneeling, bending, stooping, twisting, pushing or pulling. Lifting of five pounds was limited to zero to a half hour daily; sitting to zero to seven hours daily; and standing and walking zero to a half hour daily. Simple grasping and fine manipulation were limited to three to four hours daily, with the left hand and reaching at or above shoulder level was limited to zero to one hour daily. Appellant did not accept the offered position.

In a December 17, 2009 report, Dr. Steier noted that, since last being seen, appellant noted increased right hand and left hand paresthesias with repetitive activity; that he was using his left arm more due to continuous problems with the right upper extremity, especially fine motor activity; that he had developed tremors with longer periods of standing that also occurred with walking less than 500 feet; that he had developed more restless leg and arm symptoms; and had noticed a decrease in his right arm fine motor activity. He indicated that appellant described an inability for lifting, sitting, standing or walking for any extended period of time and could not perform simple grasping or fine manipulation in handling either waste or manual mail. Dr. Steier advised that neurologic examination demonstrated no atrophy in any extremity including his median intrinsic hand muscles, with positive Tinel's sign and Phalen's test in both wrists and elbows. Motor examination was unremarkable, and gait was quite antalgic. Dr. Steier diagnosed status post cervical laminectomy with superimposed and secondary cervical myelopathy and recommended additional studies.

On February 5, 2010 appellant filed a recurrence claim, stating that the recurrence of disability occurred on January 2, 2010 when the employing establishment withdrew his position in the security office and required him to perform duties as a mail handler. The employing establishment advised that his modified position in the security control office had been eliminated on January 1, 2010 due to administrative reasons, and that the new position was within his physical restrictions. Appellant also filed a claim for compensation beginning January 8, 2010.

On an OWCP work capacity evaluation dated January 11, 2010, Dr. Steier advised that appellant was totally disabled due to cervical radiculitis, lumbar radiculitis, paresthesias in both hands and tremors and restless leg syndrome, making it difficult for him to stand. In a report dated January 19, 2010, he stated that he saw appellant on December 17, 2009 and was “being asked to seek total medical disability from a neurological standpoint.” Dr. Steier advised that appellant’s neurological condition limited his ability to perform work duties during an eight-hour day for any length of time. In a second January 19, 2010 report, he indicated that he had reviewed appellant’s new job offer and found it not suitable and outside his restrictions. Dr. Steier further stated that appellant could not perform mail handler duties and reiterated that appellant was neurologically unable to work. On a January 22, 2010 work capacity evaluation, he advised that appellant could not perform the duties of his usual job because he was unable to perform repetitive work due to cervical and lumbar radiculitis. Dr. Steier advised that reaching was restricted to zero to one hour daily.

By letter dated February 11, 2010, the employing establishment informed Dr. Steier that, due to operational changes, appellant’s prior position had been eliminated and a position had been found with job tasks within the same physical restrictions. It asked him to indicate the neurological deficit impeding him from performing sedentary duty. On February 23, 2010 OWCP informed appellant that the medical evidence received from Dr. Steier was insufficient to establish his claim and asked that he provide a medical report explaining with sufficient rationale what caused his total disability.

Appellant submitted a January 22, 2010 treatment note in which Dr. Steier noted appellant’s complaint of neck pain and weakness, pain, numbness and tingling in both arms, back, leg and foot pain and numbness and difficulty walking. Motor examination revealed diffuse weakness and patchy decrease in sensation in all extremities. Coordination was limited due to diffuse weakness and gait was antalgic. Dr. Steier diagnosed cervical spondylitic abnormality without myelopathy.

By decision dated October 1, 2010, OWCP denied appellant’s recurrence and disability compensation claims on the grounds that the evidence did not show a material worsening of appellant’s condition or a change in the nature and extent of his light-duty requirements. Appellant timely requested a hearing, which was held on April 7, 2011. At the hearing, counsel argued that there was a change in the nature of the new position because it required physical activity outside appellant’s restrictions, noting that, *e.g.*, if he boxed mail, he would have to kneel. Appellant testified that he has not worked since January 2010, and that Dr. Steier had died.

In statements dated April 8 and May 2, 2011, counsel asserted that the duties and physical requirements of the position offered in December 2009 were not the same as those appellant had performed since December 2003 and, therefore, there had been a change in the nature and extent of appellant’s light-duty job requirements, asserting that boxing mail required reaching, bending, grasping and fine manipulation. He enclosed an on-site job analysis prepared by occupational therapists for the position of distribution clerk dated November 19, 1998, revised May 28, 2002.

On May 2, 2011 K.J., Senior Health and Resource Management Specialist at the employing establishment, commented on the hearing transcript. She maintained that appellant had not established medically or factually that he sustained a recurrence of disability due to a material change in his condition or in the job requirements and noted that he became totally disabled the day the new job began and never worked at the position. K.J. explained that his previous job no longer existed and that, in the new position, appellant was not required to perform the full duties of a mail handler. On May 16, 2011 counsel commented on the employing establishment's May 2, 2011 letter. He maintained that there were still postal employees working at security monitoring and other duties of appellant's previous position, asserting that the employing establishment simply withdrew jobs from disabled workers and gave those tasks to others. Counsel continued to argue that there had been a material change in appellant's job requirements.

In a June 21, 2011 decision, OWCP's hearing representative affirmed the October 1, 2010 decision, finding that appellant did not show a change in the nature or extent of his limited duty, did not establish that the position was outside his work restrictions and that the medical evidence did not establish a change in the nature and extent of his work-related medical condition.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.³ This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁴

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.⁵

³ 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

⁴ *Id.*

⁵ *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Terry R. Hedman*, 38 ECAB 222 (1986).

ANALYSIS

The Board finds this case must be remanded to OWCP for further adjudication on the issue of whether appellant sustained a recurrence of disability on January 2, 2010.

On December 11, 2003 appellant returned to a modified position in security control for four hours daily and to eight hours on January 8, 2004. He continued in that position until January 2, 2010, when he stopped work. The employing establishment offered appellant a new and different modified position on December 14, 2009 as it stated that the security control position had been eliminated due to administrative reasons. The written duties of the December 14, 2009 position indicated that for six to eight hours daily, appellant was to work at pars/waste mail, main office box section and manuals 030.

By decision dated October 1, 2010, OWCP found that the physical requirements were the same in the 2009 job offer as in the 2003 job offer. The Board, however, finds that OWCP did not adequately consider all the relevant evidence of record on this issue. The actual physical requirements of the position held since 2003 are not clear from the record. In comparing the requirements found on the 2003 job offer and those found on the August 9, 2007 duty status report, differences are seen in standing, walking, twisting, pulling, pushing, fine manipulation and reaching above the shoulder requirements. In addition, the position offered in 2009 required three to four hours of fine manipulation, whereas the 2003 offer only required two hours.

Moreover, the offered position was not in accordance with the physical restrictions included in the contemporaneous medical evidence. In reports dated December 17, 2009 to January 22, 2010, Dr. Steier, an attending neurologist, first indicated that appellant had increasing problems regarding mobility and beginning on January 11, 2010 advised that appellant was totally disabled from a neurologic standpoint due to cervical radiculitis, lumbar radiculitis, paresthesias in both hands and tremors and restless leg syndrome. He further advised that, after a review of the new job description, appellant could not perform the work duties which were outside his medical restrictions. Dr. Steier's examination of January 22, 2010 demonstrated diffuse weakness and patchy decrease in sensation in all extremities.

OWCP considered the medical evidence insufficient to establish a recurrence of disability as it did not establish that the 2009 position was outside appellant's work restrictions, and that the medical evidence did not show a material worsening of the employment-related condition. If there is a new position with new job duties that are inconsistent with the current medical restrictions, then OWCP needs to make a proper finding as to whether the medical restrictions are employment related.

As noted above, an employee who is working in a light-duty position following an employment injury may establish a recurrence of total disability by showing either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.⁶

⁶ *Id.*

The case will be remanded to OWCP for further adjudication on the recurrence of disability issue presented.⁷ After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that this case must be remanded to OWCP for proper findings and an appropriate decision as to the recurrence of disability claim.

ORDER

IT IS HEREBY ORDERED THAT the June 21, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this opinion of the Board.

Issued: February 26, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

⁷ See *D.M.*, Docket No. 11-1111 (issued March 6, 2012).